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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHAD M. CARLSEN and SHASTA L.)	
CARLSEN, husband and wife, individually)	NO. CV-09-246-LRS
and on behalf of a Class of similarly situated)	
Washington families; and CARL POPHAM)	<u>CLASS ACTION</u>
and MARY POPHAM, husband and wife,)	
individually and on behalf of a Class of)	PLAINTIFFS' RESPONSE TO
similarly situated Washington families;)	DEFENDANTS' MOTIONS TO
)	COMPEL ARBITRATION
Plaintiffs,)	
v.)	
GLOBAL CLIENT SOLUTIONS, LLC, an)	Hearing Date: February 4, 2010
Oklahoma limited liability company; ROCKY)	
MOUNTAIN BANK & TRUST, a Colorado)	
financial institution; et al.,)	
Defendants.)	

I. INTRODUCTION

This action seeks class-wide protection of Washington consumers from
predatory, and indeed criminal, business practices, through enforcement of

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS
TO COMPEL ARBITRATION: 1

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1 Washington's Consumer Protection Act, Chapter 19.86 RCW, and Washington's
2 Debt Adjusting Act, Chapter 18.28 RCW.

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4 Defendants seek sanctuary in an unconscionable arbitration provision that
5 immunizes Defendants from Washington's strong public policy of protecting its
6 citizenry from unfair and deceptive business practices, that saddles Plaintiffs with
7 unbearable financial burdens of litigation claims in a foreign jurisdiction, and that
8 unconscionably places their fate in the hands of an arbitrator of Defendants' sole
9 choosing.
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12 This Court should deny Defendants' Motions because, as provided for in 9
13 U.S.C. § 4, the making of the agreement for arbitration, as well as the terms of any
14 agreement to arbitrate, are at issue. This Court should also deny the Motions because,
15 as provided for in 9 U.S.C. § 2, the Defendants' arbitration provision violates
16 Washington's strong public policy, is substantively unconscionable, and is otherwise
17 unenforceable. Finally, a determination as to whether this matter may proceed as a
18 class action is a necessary prerequisite to any order directing arbitration.
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21 **II. ARGUMENTS**

22 **A. THE MAKING OF AN AGREEMENT TO ARBITRATE IS AT ISSUE.**

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24 The Federal Arbitration Act, 9 U.S.C. § 4, provides that a court may make an
25 order directing parties to proceed to arbitration only "upon being satisfied that the
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1 making of the agreement for arbitration . . . is not in issue . . .”

2 Defendants attach to their memoranda two unauthenticated documents
3
4 represented as being the “agreements” with named Plaintiffs. The documents have the
5 appearance of being a single integrated document. The Special Purpose Account
6 Applications, in this regard, state in unreadable minute print (less than single spaced
7 and 6 point font) that the features, terms, and conditions of the account are described
8 in an Account Agreement and Disclosure Statement that accompanies the Application.
9

10 In fact, the Account Agreement and Disclosure Statement was not supplied to
11 either Plaintiff at the time of contracting. The contents of that Account Agreement
12 and Disclosure Statement, including its arbitration provision, were unknown to
13 Plaintiffs. *See* Declarations of Mary Popham (“Popham Dec.”) and Shasta Carlsen
14 (“Carlsen Dec.”) filed in support hereof.
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17 The exclusion of the Account Agreement and Disclosure Statement from the
18 contracting documents was not oversight, but a matter of practice known to Rocky
19 Mountain Bank & Trust (“RMBT”) and Global Client Solutions (“GCS”). The
20 document was excluded in the case of each Plaintiff and with respect to two different
21 debt adjuster partners of GCS and RMBT. GCS’s and RMBT’s attachment of the
22 Account Agreement and Disclosure Statement to its subsequent “Welcome” letter is
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1 explicable only if GCS and RMBT were aware that the document was excluded from
 2 the contracting documents sent to Plaintiffs.

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 4 An enforceable contract requires mutual assent, which generally takes the form
 5 of offer and acceptance. *Yakima County (West Valley) Fire Protection Dist. No. 12 v.*
 6 *City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Whether there was
 7 mutual assent normally is a question of fact. *Sea-Van Invs. Assocs. v. Hamilton*, 125
 8 Wn.2d 120, 126, 881 P.2d 1035 (1994). The making of a contract to arbitrate,
 9 contained in The Account Agreement and Disclosure Statement, therefore, is at issue
 10 because it was intentionally excluded from the terms submitted to Plaintiffs.
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 12

13 Further, GCS and RMBT inexplicably fail to disclose to the Court that GCS has
 14 rescinded the Account Agreement and Disclosure Statement that they seek to enforce.
 15 Contrary to assurances made in the Account Agreement and Disclosure Statement that
 16 “You are the only one that has the right to authorize the transaction relating to your
 17 Account,” GCS inexplicably notified Plaintiff Pophams by letter dated July 31, 2009,
 18 that GCS had transferred Popham’s RMBT account balance to a bank in Oklahoma
 19 (apparently closing the Popham’s RMBT account). GCS further declared, “Included
 20 with this letter is an Account Agreement and Disclosure which shall govern your
 21 account going forward.” GCS’s newly minted Account Agreement and Disclosure
 22 declares that the Pophams must now arbitrate their claims in Tulsa, Oklahoma and,
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1 further, that the laws of Oklahoma now govern. To safeguard against any challenge to
 2 GCS's new declarations, the new Account Agreement and Disclosure provides that a
 3 party seeking to enforce the obligations imposed by the agreement is entitled to
 4 attorney fees and costs should they prevail. *See* Popham Declaration.
 5

6 The Court has every reason to find that the making of an agreement to arbitrate
 7 is at issue, and further, that the terms of any agreement to arbitrate are at issue. An
 8 order compelling arbitration, therefore, is not appropriate.
 9

10 **B. THE ARBITRATION PROVISION IS UNENFORCEABLE.**

11 The Federal Arbitration Act, 9 U.S.C. § 2, provides that arbitration clauses are
 12 enforceable "save upon such grounds as exist at law or in equity for the revocation of
 13 a contract." Thus, generally applicable contract defenses, such as unconscionability,
 14 may be applied to invalidate arbitration agreements without contravening § 2 of the
 15 FAA. *Doctor's Associates, Inc. v. Casarotta*, 517 U.S. 681, 687 (1996).
 16

17 GCS and RMBT's arbitration provision is unenforceable because it violates
 18 Washington's strong public policy of protecting its citizenry from unfair, deceptive,
 19 and indeed criminal business practice, through enforcement of Washington's Debt
 20 Adjusting and Consumer Protection Acts. The arbitration provision is, further,
 21 unenforceable because it imposes insurmountable financial burdens on consumers
 22 having claims of small monetary value. The arbitration provision is further
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unenforceable because of its fundamental unfairness, resulting from Defendants' sole power to hand-select the arbitrator.

1. The Arbitration Clause Violates Washington's Strong Public Policy of Protecting its Citizenry from Predatory Debt Adjuster Practices.

An arbitration clause is, in effect, a specialized kind of forum selection clause. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 838 (2007) (referencing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518 (1974)). Although forum selection clauses are *prima facie* valid, a forum selection clause may be invalid if it violates the public policy of this state. *Dix*, 160 Wn.2d at 842. In this regard, a forum selection clause that seriously impairs a plaintiff's ability to bring suit to enforce the CPA, violates the public policy of this state. *Id.* at 837.

Individual consumer actions to enforce RCW 19.86.020 and vindicate the public interest are a significant aspect of the dual enforcement scheme under the CPA, which provides for private actions in addition to enforcement actions brought by the attorney general. *Dix*, 160 Wn.2d at 836-837. The private right of action to enforce RCW 19.86.020 is more than a means for vindicating the rights of the individual plaintiff. In order to prevail in a private action under the CPA, the plaintiff must show that the challenged acts or practices affect the public interest. *Hangman Ridge Training Stables, Inc. v Safeco Title Ins. Co.*, 105 Wn.2d 778, 788, 719 P.2d 531 (1986); *Dix*, 160 Wn.2d at 837.

1 A “choice-of-forum clause should be held unenforceable if enforcement would
 2 contravene a strong public policy of the forum in which suit is brought, whether
 3 declared by statute or by judicial decision.” *Dix*, 160 Wn.2d at 836. Defendants’
 4 arbitration provision does not merely seek resolution of claims through arbitration, it
 5 ousts Washington law through provision that “the laws of the State of Colorado shall
 6 apply.” This provision of the arbitration clause, as if to ensure the point, is in
 7 addition to a “Governing Law” clause found elsewhere in the Account Agreement
 8 and Disclosure Statement that similarly attempts to supplant laws other than that of
 9 Colorado, without regard for whether Colorado law itself would direct that the proper
 10 choice of law is that of another state.¹

14 Defendants’ arbitration provision is unenforceable because it contravenes
 15 Washington’s strong public policy of safeguarding Washington consumers through
 16 private action to enforce Washington’s Consumer Protection Act.

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 19 ¹ GCS’s July 31, 2009, Account Agreement and Disclosure Statement incorporates a
 20 Tulsa, Oklahoma, forum into the sentence declaring that disputes “shall be resolved
 21 by binding arbitration.” This latter Account Agreement and Disclosure Statement
 22 contains a separate “Governing Law” provision, this time declaring that the
 23 agreement is governed by “The laws of the State of Oklahoma.” *See Popham Dec.*
 24 Ex. “C.”
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1 **2. The Arbitration Provision is Unenforceable Due to Unfairness in the**
 2 **Selection of the Arbitrator.**

3 The FAA does not authorize arbitration before a tribunal that might reasonably
 4 be thought biased against one litigant and favorable to another. *Hooters of America,*
 5 *Inc. v. Phillips*, 39 F.Supp.2d 582, 618 (S.C. 1998) (citing *Commonwealth Coatings*
 6 *Corp. v. Continental Casualty Co.*, 393 U.S., 145,148 (1968)). A bona fide
 7 arbitration agreement, thus, requires a decision maker chosen by the parties. *Cheng-*
 8 *Canindin v. Renaissance Hotel Assoc.*, 50 Cal. App. 4th 676, 681 (1996). An
 9 arbitration clause that excludes one of the parties from any voice in the selection of
 10 the arbitrator is unenforceable. *Ditto v. Re/Max Preferred Properties, Inc.*, 861 P.2d
 11 1000, 1003-4 (Okla. App. 1993). Defendants' arbitration provision unconscionably
 12 grants Defendants sole authority to designate the arbitrator. The selection must be a
 13 "qualified independent" arbitrator, but there is no requirement of impartiality nor
 14 "mechanism for ensuring neutrality." See Popham Dec. Exhibits "B" and "C" and
 15 Carlsen Dec. Exhibit "B." Defendants' arbitration clause, therefore, is unenforceable
 16 due to its fundamental unfairness.

17 **3. The Arbitration Provision is Unduly Oppressive because it Imposes**
 18 **Insurmountable Financial Burdens on Consumers Having Small**
 19 **Monetary Claims.**

20 Under Defendants' arbitration provision, known financially destitute
 21 Washington consumers must pursue claims in Colorado Springs, Colorado (or Tulsa,
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1 Oklahoma, or potentially both). Plaintiffs' individual claims are, by all measure,
2 monetarily small. The financial costs of arbitrating their claims in Colorado Springs,
3 Colorado, or Tulsa, Oklahoma, would doubtlessly exceed the value of their claims.
4 An order directing that Plaintiffs must individually arbitrate their claims, thus, would
5 foreclose all redress. *See* Carlsen Dec. and Popham Dec. Defendants' arbitration
6 clause is, thus, unduly oppressive because it imposes insurmountable financial
7 burdens on individual consumers. This obstacle, it is conceded, is not present should
8 Plaintiffs be permitted to proceed on a Class basis. Class certification, in this respect,
9 is a necessary prerequisite to avoidance of unduly oppressive arbitration. The
10 appropriateness of considering class certification before motion to compel arbitration
11 is acknowledged in Defendants' Joint Report under Fed. R. Civ. P. 26(f) recently
12 filed in a related and overlapping class action presently pending in the District Court
13 of Northern California. *See* Joint Report Pursuant to Fed. R. Civ. P. 26(f), filed
14 October 22, 2009, in *Estrella v. Freedom Financial Network, LLC; et al.*, United
15 States District Court Northern District of California, Case No. CV-09-03156-SI,
16 attached hereto as Appendix "A." To facilitate similar early treatment of the question
17 of class certification, named Plaintiffs anticipate shortly filing and noting their
18 Motion for Class Certification in this action.
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III. CONCLUSION

Defendants' motions for an order directing the parties to arbitrate should be denied. The making of an agreement to arbitrate is at issue, as are the terms of arbitration. The putative arbitration provision, moreover, is unenforceable owing to the insurmountable financial burdens the provision imposes on consumers having small monetary claims. The provision is unenforceable because of its contravention of Washington's strong public policy of protecting its citizenry from unfair and deceptive business practice through private enforcement of Washington's Debt Adjuster statute and Consumer Protection Act. Finally, the provision is unenforceable because it contains provisions that create the appearance and the reality of fundamental unfairness.

DATED this 30th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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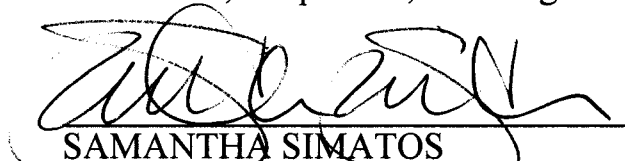
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EXECUTED this 30th day of October 2009, at Spokane, Washington.


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